

Polarized Congress May Be Here to Stay

CONGRESS IS EVOLVING INTO AN INSTITUTION WHERE COMBATIVE RULES OF ENGAGEMENT ARE THE NORM, NOT THE EXCEPTION.

National Journal Magazine

Saturday, Oct. 16, 2010

by Susan Davis

Staff Writers Jim O'Sullivan and Billy House contributed to this article.

Soon after White House officials and Democratic congressional leaders asked House Appropriations Committee Chairman David Obey, D-Wis., to begin drafting an economic-stimulus bill in the early days of the 111th Congress, he called Rep. Jerry Lewis of California, the ranking Republican on the panel.

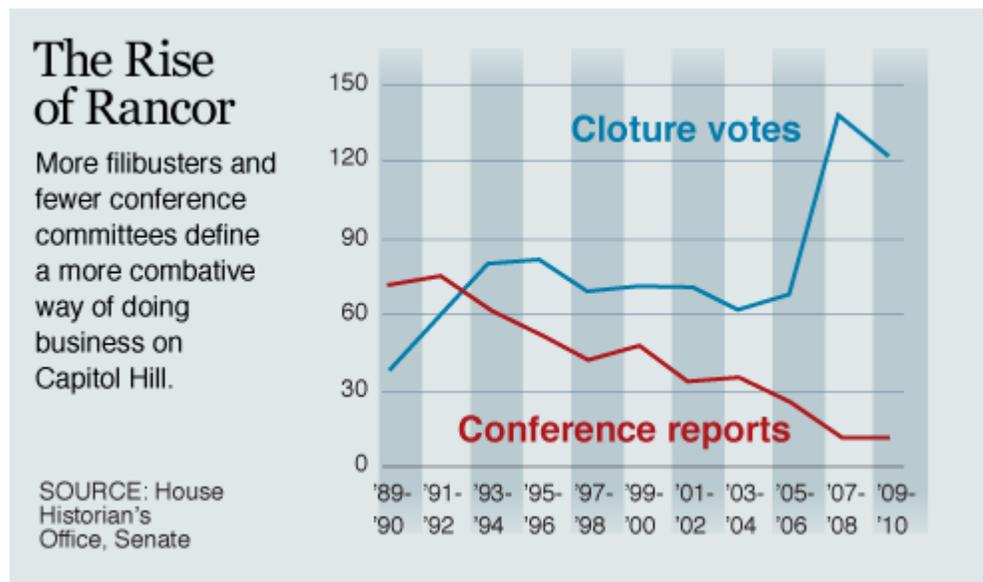
The conversation was direct. "Look, Jerry, I don't know how much we're going to be able to agree on it or how much we won't, but we would like to have this as broad-based as possible," Obey recalled telling Lewis, in an interview with *National Journal*. "Can you please tell me -- and you don't have to do it now, but think about it -- I would like to know what you guys think ought to be in a package like this and what should not be." The response was, "Dave, I'm sorry, but I've simply got my instructions. We can't play Period."

Democrats went it alone on the stimulus, passing the \$787 billion package in February 2009 on a strict party-line vote with all of the chamber's Republicans opposing the measure. But the Obey-Lewis exchange laid down a marker, and not simply for the contentious stimulus fight. In much more important ways, it established the confrontational ethos that would define the first two years of the Obama administration and provided yet another example of how new; more-combative rules of engagement on Capitol Hill have fundamentally transformed the legislative process. This is a revolution that began before Nancy Pelosi became House speaker and Harry Reid became Senate majority leader, and it will continue after them for this reason: No matter how the November's midterms turn out, neither party is likely to enjoy the sizable and stable majorities that Democrats held for the better part of four decades before the historic 1994 Republican takeover of the House and Senate.

"If the minority is going to use every possible means of obstructing, then the majority will find ways around it. So they play off each other, and you have this spiral of reactions," said Barbara Sinclair, a political scientist at the University of California (Los Angeles) and an authority on congressional procedure and the Senate filibuster.

Mourning the loss of comity and compromise in Congress has almost become a national pastime and, in the public's mind, there is a sense that the rising hostility has meant more ideological skirmishing and less productivity. But the 111th Congress proves that partisanship doesn't necessarily preclude action. To the contrary, this session is widely regarded as one of the more productive in modern history, and Democrats are eager to tout their record even as they puzzle over why they have not been able to use their legislative successes to greater political effect. But more interesting than the question of what this Congress did or did not achieve is the matter of how members went about their business. Session by session, just day by day, Congress is

evolving into a very different institution than it was just a generation ago. The pressures shaping modern governing have created a dynamic in which each Congress is more polarized and more partisan than the one before it; the 111th, under Democratic control, marks a significant milestone on that journey. “What you have seen very clearly is Congress changing how it functions,” said Fred Beuttler, the acting House historian. “It’s fascinating.” But it’s not always comforting.



Behind Closed Doors

The changes in Congress have been manifest in ways big and small: The noisy confrontations that capture the attention of the media and the public, and the subtle operational shifts evident mostly to insiders. In the latter category, consider the demise of the congressional conference committee. From the first Congress, these sessions have been a way to hash out final House and Senate compromises on legislation. The panels are a noble idea that demands some level of goodwill from each of the parties. But now, conference committees, like goodwill, have almost disappeared from the legislative landscape. A decade ago, in the 101st Congress from 1989 to '91, 44 non-appropriations bills were reported out of conference committees. Over the past two years, the number was two -- a measure on Iran and the financial-reform bill. (The 2009 stimulus bill did go to conference, but it was officially designated a supplemental appropriations bill.) House and Senate majority leaders and their chairmen are now more likely to work out controversial bills among themselves -- typically behind closed doors -- and then lob different amended versions back and forth between chambers, until one chamber votes to adopt what the other has agreed to, as amended. The strategy is commonly referred to as the “ping-pong process.” Democrats chafed under this approach when Republicans employed it after they won control of Congress in 1994, and Pelosi pledged to return to a more-traditional process after Democrats recaptured the majority in 2006. Instead, the trend has continued, with Democrats virtually setting aside conference committees altogether. Brendan Daly, Pelosi’s spokesman, said that although the speaker prefers conference committees “where there is a public exchange of ideas,” the reality of the times is that she thinks the other side would abuse the situation. “Unfortunately, the Republicans often use the conference process and any other opportunity to

obstruct legislation ... even as many of their ideas are included,” he said. The GOP used virtually the same argument to justify sidestepping conference committees when it held the majority. “The decline of the conference process is very much a consequence of partisan polarization and the routinization of the filibuster in the Senate,” says Thomas Mann of the Brookings Institution. He contends that a resulting “loss in deliberation is emblematic of what is happening throughout the legislative process.”

One obvious explanation for the declining use of conference committees is expediency. In a difficult legislative and political environment, it is easier for the leaders of the majority to manage and control the outcome of any legislative effort without a conference. In addition to prolonging the process, the committees provide a powerful forum for dissent and an arena for haggling, deal-making, and deal-breaking, all of which have the potential to derail a bill. Beuttler says that the disuse of conference committees is less about ideological positioning than about management convenience. “This gives leadership of both houses more control and say in the final product,” he noted.

But lost in the process are a few important tenets of governance fundamental to the health of a vibrant democracy -- open and honest deliberation; the willingness to consider different and opposing points of view; public scrutiny of the people's business; compromise in the interest of the common good. Despite the potential for long-term harm, it is difficult to imagine how this trend can be reversed, given the political climate.

A more-visible manifestation of the change in Congress is the seemingly inexorable rise in filibusters in the Senate and the parallel increase of cloture votes meant to break them. From 2003 to '06, while Republicans held the majority, the GOP filed 130 cloture motions to break Democratic filibusters. Since 2007, with Democrats controlling the chamber, Reid has filed 257 cloture motions -- with more likely to come in the lame-duck session.

During the current session of Congress, Sen. Debbie Stabenow, D-Mich., began bringing props to the Senate floor to display filibuster tallies; she noted that her numbers were attached by Velcro because they had to be changed so often. Compare that with the 42-year period from 1919 to '60, when cloture was filed only 27 times in the Senate and the filibuster was primarily reserved for the most-polarizing issues, such as civil-rights legislation.

Now, Obey said, “The filibuster and the threat of the Senate filibuster impacts virtually everything that happens in both bodies. When senators tell me to keep my damn nose out because it's Senate rules, my response is, ‘Hell it is.’ It has a huge impact on our ability to produce, and we get tarred by the Senate's impotence.”

Retiring Sen. Byron Dorgan, D-N.D., was first elected to the House in 1980. In his first Congress, the 97th from 1981 to '83, 31 cloture motions were filed in the Senate. When Dorgan arrived in the upper chamber in 1993, there were 60 cloture motions in his first two years. Now, even that seems like a golden age of comity.

“When I came to the Congress, if you had an idea that was important and you got a bill and had it through committee and did all the things and then got in on the floor of the Senate and got 50

votes, you were a winner,” Dorgan said. “Your idea was advancing. Now, that's not the case at all. You have to get 60 votes, for everything.”

Dorgan, for instance, thought he had found a winner with an amendment to the health care bill allowing consumers to purchase prescription drugs from suppliers overseas, where price controls drive down costs. Buffeted by a host of external factors, the proposal received only 51 votes last December, well short of the requisite 60 to get a full hearing. A Dorgan measure intended to fight the off shoring of American jobs died in late September when it attracted just 53 votes on a cloture motion. And a bill authorizing funds for diabetes programs for Native Americans never even got to the floor, Dorgan said dismissively.

Republicans blame Reid's political maneuvering for the rise in cloture votes, particularly the practice of “filling the tree,” a tactic by which the majority restricts the ability of the minority to amend legislation. The procedure allows a majority leader to file consecutive amendment motions until the overall limit established under the rules is reached. Don Stewart, communications director for Minority Leader Mitch McConnell, has worked in the Senate for 13 years and remembers the stunned reaction when then-GOP Majority Leader Bill Frist deployed the tactic, which had not been widely used before.

“That has led to an inordinate amount of cloture votes, because people don't agree to proceed because they aren't allowed to amend” a bill, Stewart said. “That's been the biggest change, in my memory.”

But filling the tree and opposition to it does not begin to explain the explosion in filibusters and the rising demand for cloture. The heavy deployment of the modern filibuster may simply be the most-conspicuous example of a new political order in which each party uses every available tool to oppose or block the other party on every issue, not only because of fundamental disagreement but also because its political base demands it. It is in that constant minding of the base that the toxic effects of the cable-television culture are most evident.

With filibusters so common and so maddening to the majority, demands for changes in Senate rules are resurfacing. The last big alteration came when Democrats, their majorities swollen by the post-Watergate landslide, pared back the cloture threshold from a two-thirds supermajority to a 60-vote requirement. This session, freshman Democrats such as the Udall cousins -- Mark of Colorado and Tom of New Mexico -- along with Sen. Tom Harkin, the veteran Iowa Democrat, have pushed for modifying the rules.

Some Democrats are less enthusiastic, or maybe more realistic, about changing Senate rules, because of the difficulty involved. Others are mindful that it doesn't take much to go from majority to minority, which immediately changes a lawmaker's view of how the filibuster should be used.

Even Dorgan, despite his frustrations with recent GOP filibusters, is not sure that the rules ought to be changed. “I think it's pretty worthwhile to talk about it. I'm not so sure in the end it will be done, and I'm not even so sure it should be done,” he said. “I think what needs to happen is

people of goodwill who come to Congress wanting to do the people's business decide to do it the way it's always been done. It's more a matter of will and intent, I think, than it is rules.”

Still, there is little question that the rules, and the changing ways in which they are employed, have fundamentally altered the nature of the chamber. The pervasive use of the filibuster has significantly narrowed the funnel through which legislation passes. The result is that many important ideas and proposals have been defeated or sidetracked even though they enjoyed majority support but fell short of the 60-vote threshold. On that list is a public-option component to health care reform, climate-change legislation, and resolution of the estate tax during the George W. Bush administration. For Republicans, however, it was the Democratic filibusters against President Bush's judicial nominees that lit the fuse.

Former Sen. George Allen, R-Va., points to those filibusters as having set “the precedent” for today's state of affairs. Although he opposed filibusters then, he favors the current structure. “The way it is right now, it's protecting taxpayers to the extent we can,” Allen said.

Balance of Power

Another less-visible change with profound effect that continued in this Congress has been the shift of power from committees to the congressional leadership. Like the fall of the conference committee and the rise of the filibuster, the increased power of the leadership has hardened partisanship in both chambers. The decline of committee chairmen began in the mid-'70s, when liberals in the Democratic Caucus imposed rules changes that ended the automatic deference to seniority in naming chairmen and in 1975 overthrew three elderly committee chiefs. But over the next two decades, Democrats were cautious about overriding seniority. A more significant shift came after Republicans won control of the House in 1994.

With the GOP enjoying its first House majority in four decades, incoming Speaker Newt Gingrich bypassed the senior member on three committees to name chairmen he believed would more closely follow his agenda. Gingrich also engineered a rules change that imposed six-year term limits on committee chairmen; when those terms expired in 2001, the Republican Conference ignored the member with the most seniority in naming the leaders of six of the 13 House committees. Moderates were frequently passed over for chairmanships, which sent a clear message about the importance of loyalty to the leadership's agenda in determining who advanced in the House.

Democrats didn't adopt a similar term-limit rule and continued to defer to seniority in choosing committee chairmen after they regained the majority in 2006. But after Barack Obama reached the White House, House Democrats signaled their intent to limit the independence of panel leaders when they voted to install liberal Rep. Henry Waxman, D-Calif., as chairman of the powerful Energy and Commerce Committee and in the process removed longtime chairman John Dingell of Michigan, who was expected to oppose the climate-change legislation that Pelosi favored. Waxman ultimately steered the bill through his committee and the House.

Without seniority as a safeguard, it is virtually impossible for anyone outside of the leadership to accumulate the kind of personal power that committee chairmen amassed in the early 20th century. The result has been to consolidate power in the hands of the leadership, especially in the House; that trend was clearly visible during the Republican majorities and was reconfirmed

during the past two years with Pelosi's iron grip on the legislative process. One illustration of the decline of the committee system is the waning influence of the House Ways and Means Committee, which hardly ever meets to draft legislation. Since January 2009, the committee has marked up a total of four bills.

Obey said that the difference between modern speakerships and those of, say, the late Tip O'Neill is that winning was not everything back then; leaders used to be willing to lose. Letting the other side win is one of the many forms of compromise that have vanished from the congressional ecosystem. Obey recalled watching O'Neill lose four floor votes in one month in 1982. If that happened today, he said, the speaker's party would appear to be in chaos.

Toeing the Party Line

The cumulative effect of all these changes in the two chambers has created a level of unity within the parties -- and conflict between them -- almost unprecedented in congressional history. The first session of the Senate in the 111th Congress was likely the most polarized of any since Reconstruction. Data provided by *VoteView.com*, which is run by the University of Georgia, show that Senate Republicans voted with a majority of their Republican colleagues 87 percent of the time, while Democrats voted with a majority of their Democratic colleagues 93 percent of the time. Compare this with the 95th Congress in 1977, when the comparable figures were 77 percent for Republicans and 73 percent for Democrats. *VoteView* has compiled final data only through the end of 2009, but all of the evidence suggests that 2010 was even more polarized than last year.

Similarly, in the House in 2009, Republicans voted with a majority of their GOP colleagues 89 percent of the time, while Democrats voted with a majority of their Democratic colleagues 94 percent of the time. The comparable figures for 1977 were 70 percent for Republicans and 73 percent for Democrats.

In this antagonistic climate, there are great incentives for leaders to enforce party discipline, but there are perhaps even greater external pressures on members of Congress to toe the party line. The rise of independent campaign money and special-interest groups, the force of the 24-hour news cycle, and the explosive growth of social media have created an environment in which almost every vote carries immediate political risk. "I think the changes in the media, the 24-hour cable, and the Internet have heightened the partisanship and made it easier for the extremes to have their voices heard," former Rep. Martin Frost, D-Texas, said.

The result is a Congress that increasingly embraces the tactics of a parliamentary system in which the minority party exists for opposition alone, while the majority party operates as something closer to a governing party that sublimates its differences to pass its leaders' program. In the House, an institution that allows the majority to impose its will on the minority, that dynamic has actually made it easier for the governing party to pass its agenda, even if it holds only a narrow edge (as Republicans did for many of the years they were in control). But the change has had the opposite effect in the Senate, where 60 votes are required to pass virtually all controversial legislation: The upper chamber is now almost incapable of functioning without resorting to an exotic bag of tricks.

While Democrats were able to move many (though not all) of their priorities through this radically transformed system with the benefit of lopsided majorities, it appears certain that there will be much slimmer margins for the majority party after the November election, no matter which side ultimately controls the House and the Senate. Maintaining the current level of unrestrained warfare with such narrow majorities could produce a Congress that descends almost entirely into stalemate and dysfunction. House Minority Leader John Boehner has pledged to restore the legislative practices of years past: returning power to authorizing committees and allowing a more open process on the House floor. But congressional observers doubt that Boehner -- or anyone else -- can reverse the tide.

“The level of resentment against the other side keeps going up,” said Sinclair of UCLA. “The Democrats really do think that Republicans have been totally irresponsible, so if the election yields them the House, Democrats will look at it as their sworn duty at this point to make Republicans' lives as unpleasant as Republicans made theirs.”

It is increasingly likely that the GOP will control one, and perhaps both, chambers of Congress next January. In all likelihood, Republicans will preside over an even more-contentious Congress than the 111th, and one in which the dialogue of the Obey-Lewis stimulus story will be constantly repeated with only slight variations: We can't play. We won't play. We don't want to play. Period.